

## Policy Paper

# The ultra vires decision of the German Constitutional Court

Time to fight fire with fire?

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#Bundes  
verfassungsgericht  
#Infringement  
procedure  
#Ultravires



The German Constitutional Court's ruling on the ECB's PSPP put Europe in a turmoil. By declaring a ruling of the European Court of Justice *ultra vires*, and therefore not legally binding on Germany, the Bundesverfassungsgericht openly called into question the primacy of EU law and the authority of the ECJ. In this policy paper we argue that on these grounds there is good reason for the European Commission to bring infringement proceedings against Germany in order to, amongst others, protect the European legal order and emphasize the notion of equality of States in the EU.

## Executive summary

On 5 May 2020 the German Federal Constitutional Court (Bundesverfassungsgericht) put Europe in a turmoil when, for the first time in its history, it declared a ruling by the European Court of Justice (ECJ) *ultra vires*, i.e. outside the ECJ's competences, and therefore not legally binding on Germany. The judgment was rendered in the context of the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP).

In its ruling, the Bundesverfassungsgericht found that the ECB decision, by lacking a proper proportionality assessment, manifestly and in a structurally significant manner exceeded the ECB's mandate, and that the ECJ, by finding the PSPP to be proportionate, equally manifestly exceeded its mandate.

The Bundesverfassungsgericht's ruling stands at the (provisional) end of a series of German judgments on the supremacy of EU law. Over the past decades, the German court has repeatedly warned the ECJ that it would impose limits to the application of EU law, and thereby the notion of EU law supremacy, in the German legal system. But it has, until now, never actually rejected that supremacy. With the PSPP judgment, the Bundesverfassungsgericht, which has long been mockingly described as the dog that barks but does not bite, has finally also bitten.

The German Constitutional Court's judgment has evoked many concerns, most notably in relation to:

- the authority of EU law, at a time when a general trend of disregard for EU law can be witnessed;
- the possible (ab)use of the judgment by other member states, which might cite it as a precedent justifying their own non-compliance with ECJ judgments;
- the impact of the judgment on the ECB's Pandemic Emergency Purchasing Programme (PEPP).

In this policy paper we explain the legal context and significance of the Bundesverfassungsgericht's ruling in the EU legal order and assess the response options for the European Commission, as the guardian of the Treaties. Notwithstanding the doubts regarding the advantages of and the necessity for such action, we argue that the Commission should bring infringement proceedings against Germany for failure by its Federal Constitutional Court to comply with a binding ECJ ruling.

An infringement procedure in this context would in particular serve to:

- protect the European legal order and the authority of the ECJ;
- give the German government an opportunity to enter into a dialogue with the Commission and reaffirm its commitment to EU law supremacy;
- pre-emptively send a warning signal to other member states and national courts, most notably the captured ones in Poland and Hungary, that non-compliance with ECJ judgments will not be accepted; and
- emphasize the notion of equality of States.

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## Introduction

The German Federal Constitutional Court (Bundesverfassungsgericht) put Europe into a turmoil when on 5 May 2020, for the first time in its history, it declared a ruling by the European Court of Justice (ECJ) *ultra vires*, i.e. outside the ECJ's competences, and therefore not legally binding on Germany.<sup>1</sup> The Court, which has long been mockingly described as the dog that barks but does not bite, now has indeed bitten – and it has done so with a vengeance.<sup>2</sup>

The judgment was rendered in the context of the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP), but it seemed less to be a ruling on the ECB programme as such and more a message from the German court in Karlsruhe to the European court in Luxembourg. Most notably, the German judges in the ruling openly call into question a fundamental aspect of the EU legal order: the primacy of EU law and the authority of the ECJ to exclusively rule on the validity of EU law.

The judgment was rendered at a time in which the EU finds itself in a multitude of crises: a corona crisis, which is also a political crisis that has, at least in the beginning, resulted in surging unilateral actions by member states, rather than in a common European response; an upcoming economic crisis, whose asymmetric impact will most likely deepen the division between the member states; an ongoing migration crisis in Greece; and a derailing rule of law crisis in particular in Poland and Hungary. In this context, the judgment by the German Bundesverfassungsgericht has raised many concerns, most notably in relation to:

- the authority of EU law, at a time when a general trend of disregard for EU law can be witnessed;
- its possible (ab)use by other member states, which might cite it as a precedent justifying their own non-compliance with ECJ judgments;
- its impact on the ECB's Pandemic Emergency Purchasing Programme (PEPP), which is intended to counter the adverse economic effects of the corona crisis.

In this policy paper we explain the legal context of the German Federal Constitutional Court's judgment of 5 May 2020 within the European legal order and assess the response options for the European Commission, as the guardian of the Treaties. While there is good reason for the Commission not to take any action, we argue that, in light of the legal significance and possible political ramifications of the judgment, an infringement procedure might be well advised.

It should be noted that we will not engage in a discussion of the economic policy implications of the judgment in this paper, nor will we discuss its consequences for the ECB or for the future of the Economic and Monetary Union (EMU).

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<sup>1</sup> BVerfG, *Judgment of the Second Senate of 05 May 2020*, 2 BvR 859/15.

<sup>2</sup> M. Van der Sluis, *"Karlsruhe bites with a vengeance"*, 5 May 2020, EU Law Live Analysis.

## 1 What the judgment is about

The judgment of 5 May is the (provisional) ending of a story that goes a long way back. In March 2015, the ECB adopted the Public Sector Purchase Programme (PSPP)<sup>3</sup> allowing the purchase, on the secondary market, of government bonds of Eurozone member states. This means that once the bonds are emitted by the governments on the primary market, the ECB can buy such bonds from other parties. In line with the ECB's mandate, the ultimate aim of the PSPP, according to the ECB, is to ensure that the inflation target is met.

Several German citizens subsequently lodged a complaint before the Bundesverfassungsgericht claiming that:

- the ECB illegally circumvented the prohibition on monetary financing laid down in Article 123 TFEU;
- the ECB overstepped its monetary policy mandate by pursuing an economic policy; and that
- the ECB's decision violated Germany's democratic principles, which is a part Germany's constitutional identity, because it made it impossible for the German Parliament to remain in control of Germany's public finances.

These citizens thus asked the Bundesverfassungsgericht to, amongst others, apply the *ultra vires* doctrine, i.e. to rule that by adopting its decision, the ECB has manifestly and in a structurally significant manner exceeded its competences under the EU Treaties. In line with its established jurisprudence (see below), the German court referred a preliminary question<sup>4</sup> to the ECJ allowing the ECJ to look into the matter first. This was only the second time ever that the Bundesverfassungsgericht referred such a question to the ECJ. However, it still did not seem to fully understand the purpose and spirit of this procedure in its referral, since, just as with its first reference<sup>5</sup>, it did not really ask a question to the ECJ. Instead it seems to understand the procedure as an opportunity for the ECJ to simply endorse the Bundesverfassungsgericht's own assessment of the legality of EU decisions.

The ECJ did not take up this 'invitation' and ruled in its Weiss judgment<sup>6</sup> of 2018 that the ECB's PSPP decision was legal under EU law. Under the EU Treaties, the primary objective of the ECB is to maintain price stability, which is done through monetary policy. Economic policy, on the other hand, in principle remains the reserve of the member states. In order to distinguish (acceptable) monetary policy from (unacceptable) economic policy, the ECJ reaffirmed that what is decisive are the objectives pursued and the instruments used by the ECB (para. 53). The Court thereby reconfirmed that the ECB's decisions do not cease to constitute monetary policy simply because they have indirect effects on economic policy and explicitly refuted the claim of the Bundesverfassungsgericht that, if those indirect effects are foreseeable when the decision is adopted, they cannot be qualified as indirect (para. 62).

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<sup>3</sup> Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10).

<sup>4</sup> BVerfG, *Order of the Second Senate of 18 July 2017*, 2 BvR 859/15.

<sup>5</sup> BVerfG, *Order of the Second Senate of 14 January 2014*, 2 BvR 2728/13.

<sup>6</sup> Judgement of 11 December 2018, *Weiss*, Case C-493/17.

Having confirmed that the ECB's decision was a monetary policy (and not an economic policy) decision, the ECJ proceeded by verifying the proportionality of the decision. In other words: was the measure appropriate and necessary to achieve monetary policy objectives and did it not go beyond these objectives? The Court here accepted the ECB's position that large-scale purchases of government bonds can contribute to achieving a healthy inflation (para. 77) and that the unconventional instrument of buying government debt on the secondary market was also necessary because the conventional instruments did not produce the desired effects anymore (para. 80). Finally, the ECJ noted that the ECB had also weighed up the various interests involved to make sure that the PSPP, even when appropriate and necessary to achieve monetary policy, would not unduly impact on those interests (para. 93). The ECJ thus concluded that the ECB's decision was not manifestly disproportionate.

Under the preliminary ruling procedure, the referring national court is then obliged to abide by the ECJ's ruling. The Bundesverfassungsgericht recognizes this (para. 117) but finds that the ECJ's Weiss judgment is untenable and that it is therefore not bound by it. In what follows (paras. 120-154) it carefully analyses the ECJ's proportionality assessment. Crucially it not only refers here to the principle as enshrined in Article 5(4) TEU but also to Article 5(1) second sentence TEU, which lays down the principle of conferred powers (para. 119). Its analysis leads it to the conclusion that the ECJ manifestly exceeded its mandate when it found the PSPP to be proportionate (para. 155) and that this was structurally significant since the Weiss judgment allegedly results in an impossibility to distinguish monetary and economic policy (para. 157). In relation to the ECJ's judgment the Bundesverfassungsgericht then concludes (para. 166) that "[t]he CJEU thus acted *ultra vires*, which is why, in that respect, its judgment has no binding force in Germany."

Returning to the actual issue before it, the Bundesverfassungsgericht finds that, since the ECJ's assessment in Weiss was deficient, it needs to review the ECB decision itself. It then claims that judicial review of the decision is impossible because the ECB failed to properly motivate the proportionality of its decision. Applying by analogy its *ultra vires* assessment of the ECJ ruling, the Bundesverfassungsgericht also finds that the ECB decision, by lacking a proper proportionality assessment, manifestly and in a structurally significant manner exceeded the ECB's mandate.

This means that, under German law, German constitutional organs, administrative authorities and courts may not participate in the development, implementation, execution or operationalisation of the ECB's PSPP decision or the ECJ's Weiss judgment. Crucially, the Bundesverfassungsgericht leaves a window of three months for the German authorities to ensure that the ECB redrafts its decision in a way that the proportionality of the programme is 'better' motivated. During these three months German authorities may still implement the PSPP programme. This implicit instruction to the ECB, via the German government and parliament, is in itself remarkable, given the prohibition, laid down in Article 130 TFEU, for the ECB and national central banks to 'seek or take instructions' from any institution or body be it at EU or national level.



## 2 How the judgment fits (or does not fit) into German Constitutional Court's jurisprudence

### 2.1 Chronicle of an escalation foretold

The general outcry over the Bundesverfassungsgericht judgment might give the impression that the ruling came out of the blue, but in fact there has been a steady build-up towards the present escalation of events.

Summing up in a nutshell a saga that spans several decades: ever since the ECJ in the 1964 *Costa v. ENEL* case<sup>7</sup> held that EU law enjoys primacy over national law, including national constitutions, the multi-level EU legal order has been characterized by an inherent tension. Indeed, from a national perspective the national constitution is the supreme norm. This supremacy is guarded by the constitutional court.

From an EU perspective, EU law prevails over national law, even national constitutional law. Accepting that national constitutional law could override EU law would risk the uniformity of EU law across the different Member States. If EU law is not interpreted and applied uniformly, it not only loses its *raison d'être* but a measure of inequality between the member states would also be introduced. In practice this reality of constitutional pluralism (i.e. conflicting claims of absolute authority), regardless of whether it is accepted as a reality by the ECJ and the highest national courts, is managed by relying on an (in)direct dialogue between national constitutional courts and the ECJ. This dialogue allows concrete legal problems to be solved at a practical level without either one having to renounce on its (theoretic) claim of supremacy.

Of all the constitutional courts of the EU member states, the German Bundesverfassungsgericht has been the most vocal in asserting the primacy of its constitution over EU law. Over the past decades, it repeatedly warned the ECJ that, under certain circumstances, it would impose limits to the application of EU law, and thereby the notion of EU law supremacy, in the German legal system. Most notably it would not allow EU law to:

- ride roughshod over the fundamental rights protected in the German constitution;
- undermine Germany's constitutional identity; or
- restrain it in checking whether the EU respects the limits of the powers conferred on it (*ultra vires* review).

At each of these occasions however (see table below), the Bundesverfassungsgericht simply asserted in general that it is not ultimately bound by the supremacy of EU law without actually rejecting that supremacy in the specific case at hand. This has led to the recurring observation that the judges in Karlsruhe are like barking dogs that never bite. But now that the Bundesverfassungsgericht for the first time ever has declared an EU act *ultra vires*, it has finally also bitten.

**“From a national perspective the national constitution is the supreme norm. This supremacy is guarded by the constitutional court. From an EU perspective, EU law prevails over national law, even national constitutional law.”**

<sup>7</sup> Judgment of 15 July 1964, *Costa v ENEL*, Case 6/64.



**Table 1: Important cases for the relationship between the Bundesverfassungsgericht (here: FCC) and the ECJ**

<b>Case</b>	<b>Type of limit</b>	<b>Why it was important</b>
Solange I (1974)	Fundamental rights	The Federal Constitutional Court (FCC) first put a limit to European Communities (EC) law supremacy by declaring that as long as the EC did not have a sufficient fundamental rights protection, it would retain the right to assess the compatibility of EC law with the fundamental rights of the Basic Law, and in case of non-compliance, EC law would not be applicable in Germany.
Solange II (1986)	Fundamental rights	As a follow-up to Solange I, the FCC inverts its approach by declaring that as long as the EC ensured effective fundamental rights protection, the FCC would refrain from assessing the compatibility of EC law with the fundamental rights of the Basic Law.
Maastricht (1993)	<i>Ultra vires</i>	Ruling on the compatibility of the Maastricht Treaty with the Basic law, the FCC emphasized that any transfer of power to the EU requires approval by the German parliament. The FCC therefore retains the right to assess whether EU institutions have exceeded the powers granted to them under the Treaties, in which case their actions would no longer be covered by the German ratification law, as adopted by the German parliament, and therefore <i>ultra vires</i> and not binding on Germany.
Lisbon (2009)	Constitutional identity	Ruling on the compatibility of the Lisbon Treaty with the Basic law, the FCC specified that the exercise of some core state functions may not be transferred to the European level, and that it retains the right to review EU acts against the inviolable core content of the constitutional identity of the Basic Law.
Honeywell (2010)	<i>Ultra vires</i>	The FCC clarified its <i>ultra vires</i> doctrine by stating that for it to find an act by EU institutions to be <i>ultra vires</i> , the act must constitute a manifest and structurally significant transgression of their competences.
OMT (2016)	<i>Ultra vires</i>	After having first hinted at its willingness to declare the ECB's OMT programme <i>ultra vires</i> in its (first ever) preliminary reference to the ECJ, the FCC in the end followed the ECJ's preliminary ruling, declaring OMT compatible with the Basic Law as long as the ECB complied with the requirements set out by the ECJ.

PSPP (2020)	<i>Ultra vires</i>	The FCC, for the first time ever, declared an act by an EU institution, in this case the ECB PSPP, <i>ultra vires</i> . It furthermore also declared the preliminary ruling of the ECJ, which had confirmed the legality of the PSPP, to be <i>ultra vires</i> .
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## 2.2 Inconsistent *ultra vires* scripts?

While the ruling of 5 May 2020 to a certain extent fits into the series of German rulings on EU law supremacy, there are also some inconsistencies with regard to the application of the *ultra vires* doctrine.<sup>8</sup>

Substantively, in *Honeywell*, the Bundesverfassungsgericht stated that it would only find an act by an EU institution to be *ultra vires*, if the act manifestly transgressed the institution's mandate. But if the *ultra vires* act of the ECB in this case is indeed manifest, as would be required under its own *ultra vires* doctrine, why did the Court leave a window of three months for the ECB to properly motivate its decision? Is the Bundesverfassungsgericht suggesting that an identical decision but with a more elaborate reasoning might not meet its threshold for an *ultra vires* act? If so, how could that act (without an elaborate motivation) then *manifestly* go beyond the ECB's mandate?<sup>9</sup> While it is true that its PSPP judgment follows the line of previous judgments relating to EMU matters, and in this regard does not come as a surprise,<sup>10</sup> the German court's judgments on the Outright Monetary Transaction (OMT) have themselves also been heavily criticized. This was most notably done by two judges of the Bundesverfassungsgericht itself, Justices Lübbe-Wolff and Gerhardt, in their dissenting opinions.<sup>11</sup>

From a procedural point of view, it should in particular be noted that in *Honeywell*<sup>12</sup> the Bundesverfassungsgericht defined that the script it would follow in exercising *ultra vires* reviews would be an EU-friendly (*Europafreundlich*) one. In its judgment of 5 May 2020, however, it does not only hold that the ECB acted *ultra vires*, after the ECJ ruled to the contrary in the *Weiss* judgment. Instead it also held that the ECJ's *Weiss* judgment was *ultra vires*, *without* giving the ECJ an opportunity to further clarify its *Weiss* judgment. This distinction is important because under established ECJ case law,<sup>13</sup> a national judge can always ask follow-up preliminary

<sup>8</sup> See for a critical analysis of the case in light of previous judgments, and in particular with regard to the domestic constitutional requirements in Germany, also: P. Eleftheriadis, "Germany's Failing Court", 18 May 2020, *Verfassungsblog*.

<sup>9</sup> The proportionality assessment by the Bundesverfassungsgericht, and in particular its view on the relation between economic and monetary policy, has also been heavily criticized by the presiding judge of the Bundesgerichtshof Peter Meier-Beck: P. Meier-Beck, "Ultra Vires?", 11 May 2020, *D'Kart Antitrust Blog*.

<sup>10</sup> A. Bobic and M. Dawson, "What did the German Constitutional Court get right in *Weiss II*", 12 May 2020, *EU Law Live Op-Ed*.

<sup>11</sup> *Dissenting opinions* by Justices Lübbe-Wolff and Gerhardt in BVerfG, Order of the Second Senate of 14 January 2014, 2 BvR 2728/13. See for a comparative analysis of the Bundesverfassungsgericht's approach to constitutional identity in the OMT decision also: M. Claes and J.H. Reestman, "The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the *Gauweiler Case*", (2015) 16 *German Law Journal*.

<sup>12</sup> BVerfG, Order of the Second Senate of 06 July 2010, 2 BvR 2661/06, paras. 58 et seq.

<sup>13</sup> Judgment of 13 March 1991, *Cotter and McDermott*, Case C-377/89.

questions if a preliminary ruling of the ECJ is unclear (as long as the national judge does not contest the ECJ's judgment).<sup>14</sup> In *Taricco II* the Italian Corte Costituzionale drew the ECJ's attention to the problematic repercussions of one of its earlier preliminary rulings. The Italian court recognized that it should apply the preliminary ruling given its binding effect (even if it had not referred the preliminary question itself) but noted that applying the ruling would result in a conflict "with the overriding principles of the Italian constitutional order" (para. 13). As a result, it asked the ECJ to clarify the precise requirements flowing from the *Taricco I* judgment, allowing the ECJ to refine (or even alter) its previous preliminary ruling, thereby preventing a conflict such as the one we are witnessing now.<sup>15</sup> If the Bundesverfassungsgericht really had wanted to understand the Court's 'incomprehensible' Weiss judgment, rather than needing an excuse to disregard a ruling which it does not like, it would also have asked for clarification instead of simply dismissing the ECJ's ruling as being incomprehensible.

Instead of acting in a *Europafreundlich* manner, the Court thus seemed to have gone nuclear on a rather procedural aspect of a case (the lack of a proportionality assessment by the ECB). Furthermore, qualifying the deficient proportionality assessment as not only manifest but also as a structurally sufficiently serious transgression of powers seems at the very least questionable and is based on a novel function which the Bundesverfassungsgericht gives to the proportionality principle (see below).

## 3 Why the judgment evokes so many concerns

### 3.1 First concern: undermining the EU legal order and the authority of EU law

The judgment of the German Bundesverfassungsgericht undermines the EU legal order and calls into question the authority of EU law, at a time where a general trend of disregard for EU law can be witnessed. From an EU perspective, the judgment constitutes a flagrant breach of EU law and a serious blow to the European legal order for several reasons:

- National courts may not declare EU legal acts (like ECB decisions) invalid unless authorized to do so by the ECJ. This follows from well-established case law.<sup>16</sup> By nonetheless doing so, the Bundesverfassungsgericht calls into question the authority of the ECJ as the sole arbiter of the validity of EU law.
- The judgment also goes against the fundamental notions of supremacy of EU law and its uniform application in the member states (as explained above), and thereby undermines the very foundations of the EU legal order.
- By disregarding the answer which the ECJ gave to its preliminary question, the Bundesverfassungsgericht moreover undermined the whole purpose of the preliminary ruling mechanism, which in *Opinion 2/13*<sup>17</sup> the ECJ described as the 'keystone of the multilevel EU legal system'. It sets up a dialogue between the ECJ and the courts of the member states, thus serving to ensure the consistency and full effect of EU law, though of course a dialogue implies that it goes both ways.

**"Instead of acting in a *Europafreundlich* manner, the Bundesverfassungsgericht seemed to have gone nuclear on a rather procedural aspect of a case."**

**"The judgment of the German Bundesverfassungsgericht undermines the EU legal order and calls into question the authority of EU law, at a time where a general trend of disregard for EU law can be witnessed."**

<sup>14</sup> Order of 5 March 1986, *Wünsche Handelsgesellschaft*, Case 69/85.

<sup>15</sup> M. Bonelli, "The *Taricco* saga and the consolidation of judicial dialogue in the European Union", (2018) 25 *Maastricht Journal of European and Comparative Law*.

<sup>16</sup> Judgment of 22 October 1987, *Foto-Frost*, Case 314/85.

<sup>17</sup> *Opinion 2/13* of 18 December 2014.

While it is true that the Czech Constitutional Court and the Danish Supreme Court have also had their conflicts with the ECJ in the past (see table below), it should be clear that the present case is fundamentally different from earlier incidents and that therefore it is not without cause that it has evoked more concerns.

**Table 2: Cases in which a highest national court has rejected an ECJ ruling**

<b>Case</b>	<b>What the case was about</b>	<b>Why the national court rejected the ECJ ruling</b>
Czech Landtová case (2012)	The compatibility of the Czech pension scheme, as applied to beneficiaries who before the dissolution of the Czechoslovak state were employed on Slovak territory, with Regulation 1408/71 on the application of social security schemes to employed persons and the EU principle of non-discrimination on grounds of nationality (the ‘Slovak pensions’).	In the Czech Constitutional Court’s view, the ECJ failed to take into account the very unique situation of the dissolution of the Czechoslovak state, which precludes the existence of a cross-border element that in turn is a condition for the applicability of the regulation. Since the ECJ overlooked these facts, its decision was considered <i>ultra vires</i> .
Danish Ajos case (2016)	The compatibility of a Danish law depriving an employee of his entitlement to a severance allowance after having reached a certain age, with the EU principle of non-discrimination on grounds of age.	According to the Danish Supreme Court, judge-made principles of EU law cannot take precedence over Danish law since they were not written in the Treaties when the Danish accession law was adopted; therefore, the Danish courts themselves cannot disapply national law as adopted by the Danish parliament on such grounds.
German Weiss case (2020)	Whether the ECB has exceeded its competences under the Treaties by adopting the purchasing public sector bonds programme (PSPP).	According to the German Constitutional Court, the ECB manifestly exceeded its competences under the Treaties by not engaging in an adequate proportionality assessment of its programme, and the ECJ, in ruling the programme legal under EU law, equally stepped outside its competences and acted <i>ultra vires</i> .

Firstly, the Bundesverfassungsgericht is the national constitutional court that by far carries the largest political weight in the EU. It is known to have significantly impacted the case law of other national courts in EU law in the past and is normally the court that is referred to when other national courts in the EU cite foreign case law in their own jurisprudence.<sup>18</sup> An *ultra vires* decision by the Bundesverfassungsgericht is likely to not only have much more impact on the EU legal order,

<sup>18</sup> M. Claes, “The Validity and Primacy of EU Law and the ‘Cooperative Relationship’ between National Constitutional Courts and the Court of Justice of the European Union”, (2016) 23 Maastricht Journal of European and Comparative Law.

but also lend much more weight to any future *ultra vires* claims by other member states. The important position of the Bundesverfassungsgericht can also be seen in the anticipation with which the judgment was expected in legal, political, and academic circles, both in- and outside of Germany, and also in the attention that its earlier jurisprudence, in particular its cases relating to the EMU, has received. If all national courts were now to come to the opinion that they too, like the German court, can decide to not follow an ECJ ruling whenever it suits them best, the very foundations of the EU legal order would be endangered.

Secondly, the Czech and Danish cases also differed in their nature from the German case because they concerned the breach of EU law by a national statute and not the validity of an EU act. The Czech Landtová case was about the interpretation of an EU regulation on the application of social security schemes to employed persons, and whether the Czech pension scheme was compatible with it. The Danish Ajos case concerned the applicability of the (judge-made) principle of non-discrimination on grounds of age to a national statute. Both cases therefore concerned the interpretation of EU law, and in both cases the conflict could have been easily resolved through an amendment of the conflicting national law.

This is fundamentally different in the German PSPP case. Here the question concerned the (in)validity of an EU act and not just the interpretation of EU law. By declaring an EU legal act inapplicable, the German Constitutional Court went much further than its Czech and Danish counterparts. It did not just step onto the ECJ's toes, but in fact directly "stepped into the shoes of the Luxembourg court".<sup>19</sup> Moreover, it did so with regard to an act that is crucial for the stability of the Eurozone, the *ultra vires* declaration of which will have more impact by its nature.

In addition, the German Constitutional Court's quarrel with the ECJ is focussed on the assertion that the European court does not apply the proportionality principle (known in most legal systems) in a way that is sufficiently similar to how that principle is understood by the German judges. This ignores the fact that the EU legal order is autonomous and that EU legal concepts similar to those that exist in national law may not have the same meaning. This also means that the methodology of applying proportionality in EU law may be different from the methodology in German law. In this regard, the Bundesverfassungsgericht tries to show that the ECJ in Weiss was not consistent with its own established case law on proportionality but it does so by bringing in cases that are not comparable to the present one since they concerned the review of member state action (see the jurisprudence cited in paras. 145-151). Only the cases in which the ECJ reviews acts of EU institutions are really comparable (para. 152) but differently from what the Bundesverfassungsgericht suggests, these are also characterized by a large deference towards the policy choices made by the competent EU authorities. The Bundesverfassungsgericht requires a 'full' proportionality justification in light of the economic effects of the PSPP, whereas the ECJ accepts the reassurances given by the ECB as long as they are not manifestly erroneous. In addition, because it was conducting an *ultra vires* review, the Bundesverfassungsgericht needed a 'bridge' between proportionality and the principle of conferred powers. Although such a function of the EU law principle of proportionality is not recognized by the ECJ (or, to our knowledge, by any other constitutional court in the EU) the Bundesverfassungsgericht still claims (para. 123) that it has a "corrective function for the purposes of safeguarding the

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<sup>19</sup> D. Sarmiento, "An Infringement Action against Germany after its Constitutional Court's ruling in Weiss? The Long Term and the Short Term", 12 May 2020, EU Law Live Op-Ed.

competences of the member states.” As a result, not only in terms of intensity of review but also as to the function of proportionality, the Bundesverfassungsgericht seems to impose its own standard on the ECJ (and indirectly on the other member states).

In short, the Bundesverfassungsgericht is right to note that the ECJ’s approach would not meet the standard of a German court. Yet the ECJ is not a German court but rather the court of a new and autonomous legal order which is based, given the equality between member states, on common constitutional traditions of all EU member states.

### **3.2 Second concern: (feared) abuse by other member states**

A second concern relates to the fear that the judgment might now be (ab)used by the governments and courts of other member states, which might cite it as a precedent justifying their own non-compliance with ECJ judgments. Particularly the derailing rule of law and democracy situation in Poland and Hungary come to mind here. Polish Deputy Justice Minister Kaleta was indeed quick to applaud the German judgment on the very same day as it was delivered as a defence of national sovereignty: “the EU says only as much as we, the members states, allow it.”<sup>20</sup> A few days later, on 9 May 2020, Hungarian Justice Minister Varga said in an interview that “the fact that ECJ has been overruled is extremely important”. Julia Przylebska, the head of Polish constitutional court, responded by emphasizing that it is the national constitutional courts that have the final word.<sup>21</sup>

To put this into context, just a few days before the ruling of the Bundesverfassungsgericht, on 29 April 2020, the Commission launched an infringement procedure against Poland on the basis that its law of 20 December 2019 on the judiciary undermines the judicial independence of Polish judges and is therefore incompatible with the EU Treaties.<sup>22</sup> Concretely, the Commission alleges that the new law, the so-called ‘muzzle law’, infringes both the requirement of judicial independence and the functioning of the preliminary ruling mechanism. This infringement procedure follows a series of developments relating to the rule of law in Poland, which includes the triggering of both the Rule of Law Framework and the procedure of Article 7 TEU as well as three other infringement procedures against Poland. All infringement actions were referred to the ECJ, which has confirmed the Commission’s position in the two first cases. At the time of writing the third case is still pending but, following a Commission’s request for interim measures on 14 January 2020, the Court has already ordered that Poland must immediately suspend the application of the contested national provisions on the powers of the Disciplinary Chamber of the Supreme Court.<sup>23</sup>

In the meantime, in Hungary, the parliament pushed through a new emergency law<sup>24</sup> on 30 March as a response to the corona crisis. Under the new law the Hungarian government under Prime Minister Orbán can rule by decree as well as suspend the enforcement of certain laws. This is just the latest development

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<sup>20</sup> Tweet of 5 May 2020 by “Rule of Law in Poland”.

<sup>21</sup> “Eastern European states sense opportunity in German court ruling”, 10 May 2020, Financial Times.

<sup>22</sup> Commission Press Release of 29 April 2020.

<sup>23</sup> Order of 8 April 2020 in *Commission v Poland*, Case C–791/19.

<sup>24</sup> English translation of Hungarian draft law on “protecting against corona virus”.



since the coming into power of Viktor Orbán and his Fidesz party in 2010 that saw the introduction of a series of widely criticized constitutional reforms in Hungary. While it is outside the scope of this paper to trace all the rule of law developments in Hungary and the EU's responses thereto,<sup>25</sup> it should be recalled here that over the years the Commission has brought several infringement proceedings against Hungary in the context of its constitutional reforms, including the independence of the central bank, the removal of the data protection supervisor, and the mandatory retirement of judges. As recently as 25 July 2019 the Commission decided to refer Hungary to the ECJ for its so-called 'Stop Soros law'. At the time of writing of this paper also this infringement procedure is pending before the ECJ. The ECJ is moreover expected to decide on the infringement action on the Hungarian 'NGO law' in June 2020, which was referred to it in December 2017.<sup>26</sup>

The concern regarding the impact of the German Federal Constitutional Court's *ultra vires* ruling on the situation in Poland and Hungary is clear: if the German court can openly defy an ECJ ruling without any further consequences, then what would prevent the Polish and Hungarian courts (or any other national court for that matter) to do the same? Considering the political weight that the judgments of the German Bundesverfassungsgericht hold in EU law matters, it can be expected that the Polish and Hungarian constitutional courts will refer to the German ruling as a means to increase the legitimacy of any of their own potential future decisions to not comply with an ECJ ruling, regardless of how different the nature of the cases may be. Similarly, it may be feared that also the Polish and Hungarian governments will (ab)use the judgment as a basis to reject any intervention by the EU in their rule of law situations, especially now that both member states find themselves in front of the ECJ for breaches of EU law.

While it is perhaps true that the Polish government "will do what it does, independent of what [the German Constitutional Court] does", as the presiding judge of the Bundesverfassungsgericht, Andreas Voßkuhle, said in an interview.<sup>27</sup> There is also little doubt that the judgment was celebrated amongst the Polish and Hungarian governmental and judicial ranks, as outlined above. In fact, both Polish and Hungarian authorities might have often contested the legitimacy of EU intervention but, so far, they have yet to openly defy an ECJ ruling. It is quite well possible that we will soon find out whether the German ruling will have an impact on the judicial decisions of other member states or not. On 14 May 2020, the ECJ, in a preliminary ruling, found that the Hungarian practice of holding migrants and asylum seekers in a transit zone amounted to the migrants' detention and constituted a deprivation of liberty.<sup>28</sup> The Hungarian government has already called the ruling an "incorrect interpretation"<sup>29</sup> and announced that it will not accept the ECJ decision.<sup>30</sup> It now remains to be seen whether the Hungarian courts will implement the ruling or whether they will seize the opportunity to follow the German example of not complying with an ECJ decision.

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<sup>25</sup> See for this: M. Bonelli, *A Union of Values: Safeguarding Democracy, The Rule of Law and Human Rights in the EU Member States*, (2019) PhD Thesis Maastricht University.

<sup>26</sup> Commission Press Release of 7 December 2017.

<sup>27</sup> "Erfolg ist eher kalt", Interview with Andreas Voßkuhle, 14 May 2020, Zeit Online.

<sup>28</sup> Judgement of 14 May 2020, *PPU FMS and Others*, Joined Cases C-924/19 and C-925/19.

<sup>29</sup> "Hungary reacts to German constitutional court ruling", 15 May 2020, EURACTIV.

<sup>30</sup> "Orbán won't accept European court ruling on transit zone", 19 May 2020, Daily News Hungary.



### 3.3 Third concern: implications for the ECB's PEPP

Regarding the last concern related to the current corona crisis, it is conceivable that the ruling of the Bundesverfassungsgericht will have more implications for the ECB's Pandemic Emergency Purchasing Programme (PEPP)<sup>31</sup> than it will for the PSPP itself. In the immediate aftermath of the judgment, Henrik Enderlein wrote: "Today, the Court shot at the PSPP, but hit the PEPP."<sup>32</sup> The PEPP is a bond purchase programme with an initial volume of 750 billion euro, which the ECB adopted on 24 March 2020 as a means to counter the devastating economic effects of the corona crisis. Under the programme the ECB and national central banks will purchase public and private securities until at least the end of 2020. A challenge to the programme would have profound economic implications for member states but also private actors that are financially affected by the corona crisis.

It is true that the Bundesverfassungsgericht explicitly distinguishes the PEPP from the PSPP, stating that its decision of 5 May 2020 does "not concern any financial assistance measures taken by the European Union or the ECB in the context of the current coronavirus crisis".<sup>33</sup> And yet, it is unlikely, or (as one commentator put it) wishful thinking,<sup>34</sup> that the PEPP will not be affected by the PSPP decision at all. The reason is that the PEPP follows closely the rules of the PSPP, and similarly does not satisfy the proportionality requirements that the Bundesverfassungsgericht has set out for the PSPP. In particular, as Isabel Feichtner points out in her analysis, both the wide and vague description of the PEPP's policy objectives as well as the 'whatever it takes' approach underlying the programme, which does not take into account member states' economic policies, would fall foul of the German court's proportionality conditions.<sup>35</sup> It is outside the scope of this paper to analyse whether or not the PEPP exceeds the ECB's mandate.<sup>36</sup> It suffices to point out that it seems likely that citizens, unsatisfied with the PEPP, will be encouraged by the judgment by the Bundesverfassungsgericht to also challenge the legality of the PEPP in the near future through a constitutional complaint before the Bundesverfassungsgericht.

## 4 What the EU can do now

If the decision by the Czech Constitutional Court in 2012 was considered "playing with matches"<sup>37</sup> by some commentators, the decision of the German Constitutional Court in 2020 seems to qualify as "purposefully trying to start a fire". As a consequence, at least two response options seem available to the EU:

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<sup>31</sup> *Decision (EU) 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase programme (ECB/2020/17).*

<sup>32</sup> *Tweet of 5 May 2020 by Henrik Enderlein.*

<sup>33</sup> *BVerfG Press Release No. 32/2020 of 05 May 2020.*

<sup>34</sup> D. Kyriazis, "The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango", 6 May 2020, European Law Blog.

<sup>35</sup> I. Feichtner, "In the Name of the People? – The German Constitutional Court's Judgment on the European Central Bank's Public Sector Purchase Programme", 13 May 2020, Just Money Working Paper.

<sup>36</sup> See for an assessment of the legality of the ECB's PEPP: S. Grund, "Legal, compliant and suitable: The ECB's Pandemic Emergency Purchase Programme (PEPP)", 25 March 2020, Jacques Delors Centre/Bertelsmann Stiftung Policy Brief.

<sup>37</sup> J. Komarek, "Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution", 22 February 2012, Verfassungsblog.

- it lets the fire burn down by doing nothing, or
- it starts fighting fire with fire.

If the reactions by the EU institutions are anything to go by, the second option, in the form of an infringement proceeding, seems to be seriously considered at EU level. We would also advocate for such action in this policy paper. In this regard, the ECB,<sup>38</sup> ECJ<sup>39</sup> as well as the Commission have all issued statements recalling fundamental EU principles: EU law is supreme, ECJ rulings are binding on all national courts, and the ECB remains independent. In its press release, the ECJ also made note of the principle of equality between member states, which requires all national courts to ensure the full effect of EU law. Most notably, on 10 May 2020, Commission President Von der Leyen issued a statement,<sup>40</sup> in which she reaffirmed that it was the Commission's task "to safeguard the proper functioning of the Euro system and the Union's legal system" and that the "final word on EU law is always spoken in Luxembourg. Nowhere else."

#### 4.1 Option 1: let the fire burn down

As a matter of EU law, it is entirely possible for the EU to not react to the judgment. An infringement proceeding, the steps and merits of which will be discussed below, is merely an option for the Commission to respond to a breach of EU obligations by a member state, not an obligation. There are indeed good arguments for the Commission to not take action and simply let the fire burn down.<sup>41</sup> In particular there are doubts:

- what the outcome of an infringement procedure in this case could be, as the German government cannot rectify a judicial infringement of EU law;
- whether on its substantive grounds the dispute might not just resolve itself, thereby rendering an infringement procedure unnecessary when it comes to the further implementation of the PSPP.

Regarding the first point, it is in general possible for the Commission to launch an infringement procedure against a member state for actions by its highest national court. However, it has not done so often (see table below).<sup>42</sup> The reason for this is that judicial infringements of EU law are very difficult to rectify. National courts are by their nature independent. National governments, who are the real addressees of infringement procedures, cannot order their independent courts to follow an ECJ judgment. While from an EU law perspective that does not matter, an infringement procedure would nonetheless put the German government – who represents the German state externally, also for actions of its courts – in quite a tough spot, as there is little it can do to rectify the infringement.

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<sup>38</sup> ECB Press Release of 5 May 2020.

<sup>39</sup> Court of Justice Press Release No 58/20 of 8 May 2020.

<sup>40</sup> Statement by Commission President Von der Leyen of 10 May 2020.

<sup>41</sup> Diane Fromage, for example, argues for a 'de-escalation' strategy rather than confrontation in the form of an infringement procedure, while still acknowledging the Bundesverfassungsgericht's "fundamentally misguided and unlawful behaviour". See: D. Fromage, "Weiss: The Bundesverfassungsgericht's Over-Expansive Interpretation of the Bundestag's 'Responsibility For Integration' and the Need to Adapt Judicial Review Procedures to the E(S)CB's Specificities", 23 May 2020, EU Law Live Weekend Edition No. 18.

<sup>42</sup> D. Sarmiento, "An Infringement Action against Germany after its Constitutional Court's ruling in Weiss? The Long Term and the Short Term", 12 May 2020, EU Law Live Op-Ed.

Even if the Commission successfully launches an infringement procedure and even if the ECJ in the end agrees with it, such a ruling would be merely declaratory in nature. Put differently, the Court would simply confirm the existence of a failure of Germany to fulfil its obligations. Under Article 260 TFEU Germany would as a consequence then be “required to take the necessary measures to comply with the judgment of the Court.” But what would be the point of this when the German government could not take such necessary measures since it has no control over the independent Constitutional Court or over the Bundesbank? Moreover, this is not a case in which a national court has wrongly interpreted EU law or failed to refer a preliminary question to the ECJ. It is a case in which the highest national court is not following the ruling of the European Court of Justice because it believes the latter to be outside the scope of the Treaties. It is unlikely that an infringement procedure would in any way sway the German Court’s stance on this or result in a rectification of the breach. In short: is an infringement action really the right way to resolve conflicting claims of authority?

In the worst-case scenario, starting an infringement procedure would throw everyone involved into a constitutional conflict that would solve nothing and cause all actors to lose face with no gain to be won by anyone.

What is even more, on the substantive grounds of the case, i.e. the implementation of the ECB’s PSPP in Germany, it can be argued that there might not even be a need for Commission action. Crucially, the Bundesverfassungsgericht did not shoot down the programme in its judgment but left some scope for the German Bundesbank to continue implementing the PSPP. All that must be done is for the ECB to issue a proportionality assessment for its programme within three months. From this point of view, the Commission could also decide to simply wait until the dispute resolves itself. In fact, the argument has even been made that if the German authorities determine that a new decision by the ECB is sufficient in its proportionality assessment and that therefore the Bundesbank may continue in the programme, there would not even be an infringement of EU law anymore. In this regard Miguel Poiares Maduro on Verfassungsblog wrote: “In themselves, the statements of the German Constitutional Court with regard to the ECJ role are not an infringement if the judgment will no longer produce any effects contrary to EU law and its supremacy. The Commission could, in this way, continue to claim the supremacy of EU law without having to actually pursue an infringement against Germany.”<sup>43</sup> While there is merit in this argument, we would still argue that the decision of the Bundesverfassungsgericht in itself can already constitute an infringement of EU law.

## 4.2 Option 2: fight fire with fire

While letting the dispute simply fizzle out is indeed a possibility, in light of the legal significance of the judgment of 5 May 2020 and its possible ramifications, it might be ill-advised to let this incident pass without any consequences. We argue that not only can the Commission initiate infringement proceedings against Germany for the decision of its Constitutional Court, but it actually should do so. Launching an infringement procedure in this case would not be about the possible outcomes of such a procedure, the doubts regarding which remain valid, but

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<sup>43</sup> M. Maduro, “Some Preliminary Remarks on the PSPP Decision of the German Constitutional Court”, 6 May 2020, Verfassungsblog.

it would be a matter of principle. Most notably, we argue that the Commission should take action against Germany in order to:

- protect the European legal order and the authority of the ECJ;
- give the German government an opportunity to enter into a dialogue with the Commission and reaffirm its commitment to EU law supremacy;
- pre-emptively send a warning signal to other member states and national courts, most notably but not limited to the captured ones in Poland and Hungary, that non-compliance with ECJ judgments will not be accepted;
- emphasize the notion of equality of States by avoiding double standards.

For an infringement procedure to be started, the infringement must be grounded in one of the provisions of the Treaties. It is true that the supremacy of EU law, the authority of the ECJ in questions of validity of EU law and even the legal binding effects of the ECJ's preliminary rulings are in the end of the day all based on the ECJ's own jurisprudence. But an argument can nevertheless be made that the duty of the Bundesverfassungsgericht to comply with the ECJ ruling follows from Article 267 TFEU, which sets out the preliminary reference procedure, in conjunction with the principle of sincere cooperation under Article 4(3) TEU, according to which member states are obliged to take any appropriate measure to fulfil their obligations arising from Union law.

In this regard, the ECJ has already long ago confirmed<sup>44</sup> that any failure by a State organ to fulfil its obligations under EU law can lead to an infringement procedure against that member state under Article 258 TFEU. This applies to actions or inactions of all State organs, including constitutionally independent institutions such as the German Bundesverfassungsgericht. In fact, in October 2018 the ECJ ruled<sup>45</sup> that France failed to fulfil its obligations under the EU Treaties because of inaction of its highest administrative court. We therefore argue that, notwithstanding the doubts cast by some commentators on this,<sup>46</sup> it is indeed possible to launch an infringement procedure against Germany for a breach of Treaty obligations by the Bundesverfassungsgericht itself on the basis of Article 267 TFEU in conjunction with Article 4(3) TEU, without the need for further implementation of the judgment by other German authorities.

**Table 3: Cases in which the Commission has started an infringement proceeding against the highest national court of a member state**

<b>Case</b>	<b>What the case was about</b>	<b>Why the Commission started an infringement procedure</b>
Spain (2008)	The interpretation of an EU VAT directive	The Spanish Supreme Court interpreted the Directive erroneously.
France (2017)	The reimbursement of taxes to French parent companies which receive dividends from foreign subsidiaries	The French Conseil d'État did not refer a question for preliminary ruling to the ECJ, even though it should have done so under Article 267 TFEU.

<sup>44</sup> Judgment of 9 December 2003, *Commission v Italy*, Case C-129/00.

<sup>45</sup> Judgment of 4 October 2018, *Commission v France*, Case C-416/17.

<sup>46</sup> See in particular in the comments section: F. Fabbrini, "Suing the BVerfG", 13 May 2020, *Verfassungsblog*.

Concretely, the Commission could send a letter of formal notice and a reasoned opinion under Article 258 TFEU to the German government,<sup>47</sup> noting that the ruling of 5 May 2020 constitutes a breach of EU law and inviting the German government to explain how it will remedy this breach. More precisely, four breaches by the German court may be identified in this case:

- the Bundesverfassungsgericht's unilateral declaration that the ECB's decision is inapplicable;
- the Bundesverfassungsgericht's order to the German government and Bundestag to ensure that the ECB and Bundesbank redraft the decision (which is a breach of Article 130 TFEU);<sup>48</sup>
- the Bundesverfassungsgericht's failure to comply with a binding judgment of the ECJ; and
- the Bundesverfassungsgericht's failure to ask a (follow-up) preliminary question allowing the ECJ to clarify its proportionality assessment of the ECB decision.

The Commission could try and play it 'smart' by only bringing the fourth infringement before the Court. That way the focus shifts to ensuring that national courts act in a spirit of sincere cooperation towards the ECJ. After all, it is this constructive cooperation which makes constitutional pluralism function in practice, not the insistence of both levels on their (mutually exclusive) claims of final authority. In a similar manner, the German government could use the opportunity to reaffirm its commitment to EU law supremacy and the authority of the ECJ. While it is clear that the government has no control over the Bundesverfassungsgericht, it could nonetheless enter into dialogue with the Commission via the reasoned opinion stage of the infringement procedure in order to defuse the situation.

If, however, Germany, does not reply to the Commission's reasoned opinion, or if the Commission finds that Germany's reply is unsatisfactory to remedy the breach(es), the Commission can go to court. The ECJ could then, under Article 260 TFEU, find that Germany has failed to fulfil its obligation under the Treaties, and require it to take the necessary measures to rectify the breach.

In any case, the Commission should take action against Germany for the breaches of EU law committed by the German Bundesverfassungsgericht. Beyond providing for an opportunity for a dialogue with the German government on the matter, it would also shift the political pressure of (re)acting to the judgment from the central bank level to the governmental level, thus giving the ECB and the German Bundesbank some room to find a pragmatic solution regarding the implementation of the PSPP in Germany without having to consider political questions of EU law supremacy. Moreover, an infringement procedure would send important signals to Germany, Hungary, Poland and all other EU member states as regards the Commission's willingness to defend the status of EU law supremacy and the EU legal order. The question is less about the outcome of the procedure and more a matter of principle to demonstrate that the Commission, as the guardian of the Treaties, will not accept any breaches of EU Treaty obligations, no matter the mem-

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<sup>47</sup> It should be added that if the Bundesbank were to comply with the Bundesverfassungsgericht's order not to implement the PSPP, the ECB itself could start an infringement procedure before the ECJ similar to the procedure under Article 258 TFEU but based on Article 271(d) TFEU.

<sup>48</sup> F. Martucci, "La BCE et la Cour constitutionnelle allemande : souligner les paradoxes de l'arrêt du 5 mai de la Cour constitutionnelle allemande", 11 May 2020, Le Club des Juristes Blog.

ber state or the authority in breach of EU law. The EU legal order can only continue to exist and function if all member states, including their national courts, submit to the authority of EU law and the ECJ, and it is the Commission's task to ensure this, in particular with a view to the situation in Poland and Hungary.

Moreover, even if the Commission has full discretion in bringing infringement cases, it would still be politically difficult for the Commission to explain why it has initiated proceedings against Poland and Hungary in the recent past for failure to comply with EU law but will not do so against Germany. Simply letting the German judgment slide would, whether justified or not, (even further) reinforce the impression that some member states are more equal than others.<sup>49</sup> Such impressions of double standards, under a German Commission President in particular, would not only go against EU principles but also threaten the EU as a legal community more than a judgment by a national court ever could.

Procedurally, since direct appeals before the ECJ have an average length<sup>50</sup> of 19 months (or 10 months through expedited procedure), it would take some time before the ECJ could render a judgment in an infringement procedure. Still the Commission could already enforce the above-mentioned duty of sincere cooperation incumbent on the German government and Bundesbank in the short term by requesting the ECJ to impose interim measures, as it has done in the infringement proceedings against Poland, as mentioned above. In the case on the logging of the Białowieża Forest, the Court even prescribed penalty payments<sup>51</sup> for each day that Poland would infringe its order (imposing a halt to the logging). The Commission could ask the Court to do the same in the German case.

In addition to the European Commission, all the other member states could also bring such a case pursuant to Article 259 TFEU.

Yet regardless of whether the Commission (or another member state) does so, it should be noted that under EU law, every German judge, civil servant or public office holder is required to ignore the ruling of the Bundesverfassungsgericht. To say that, from a domestic constitutional perspective, this would be rather difficult to do would be an understatement, putting the German Bundesbank in particular but also the German government and Bundestag in quite a tough spot. With a view to the situation in Poland and Hungary, it might also appear somewhat ironic for the European Commission to 'invite' German authorities to disregard a ruling of their own constitutional court, when it was exactly what Poland was criticized for in early beginning of its rule of law crisis: blatantly ignoring rulings of the Polish constitutional tribunal. However, the situation is fundamentally different here. It is one thing for a national authority to ignore a court ruling out of convenience or because it disagrees. It is arguably an entirely different thing if a national authority does so in order to fulfil its obligations under EU law. Under the principle of sincere cooperation (Article 4(3) TEU) all German authorities are required to give full effect to EU law. Every act taken, by any agency of the German state, to give effect to the order by the Bundesverfassungsgericht to disapply the ECB decision is in itself an infringement that the Commission could bring before the ECJ.

**“An infringement procedure would send important signals to Germany, Hungary, Poland and all other EU member states as regards the Commission’s willingness to defend the status of EU law supremacy and the EU legal order.”**

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<sup>49</sup> Tweet of 8 May 2020 by Enrico Letta.

<sup>50</sup> European Court of Justice, *Annual Report 2019 on Judicial Activity*, p. 172.

<sup>51</sup> Order of 20 November 2017 in *Commission v Poland*, Case C-441/17.



Under established jurisprudence,<sup>52</sup> a finding of non-compliance through an infringement procedure would furthermore establish the basis for state liability. While admittedly the conditions for finding state liability as defined in ECJ case law<sup>53</sup> may be difficult to meet, a private party suffering damages because of the German Constitutional Court's ruling of 5 May 2020 could then claim compensation from the German state.

## Conclusion: time to fight fire with fire

The Bundesverfassungsgericht, which has long been mockingly described as the dog that barks but does not bite, now has indeed bitten – and it has done so with more vengeance than most had anticipated. The judgment of 5 May 2020 has evoked many concerns, most notably in relation to the supremacy of EU law and the authority of the ECJ, the feared abuse by other member states such as Poland and Hungary, and the implications for the ECB's PEPP. In light of these concerns, the judgment can no longer be qualified as playing with matches but goes far beyond that. In this policy paper we argued that while there might be good reasons for the Commission to just let the fire burn down, simply letting the judgment slide would be ill-advised. Most notably, the Commission should bring infringement actions against Germany for failure by its Federal Constitutional Court to comply with a binding ECJ ruling in order to:

- protect the European legal order and the authority of the ECJ;
- give the German government an opportunity to enter into a dialogue with the Commission and reaffirm its commitment to EU law supremacy;
- pre-emptively send a warning signal to other member states and national courts, most notably the captured ones in Poland and Hungary, that non-compliance with ECJ judgments will not be accepted; and
- emphasize the notion of equality of States by avoiding double standards.

In a time in which general trend of disregard for EU law can be witnessed, it is also time for the Commission to give up its cautious approach<sup>54</sup> and start fighting fire with fire.

**“In a time in which general trend of disregard for EU law can be witnessed, it is also time for the Commission to give up its cautious approach and start fighting fire with fire.”**

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<sup>52</sup> Judgment of 2 April 2020, *Commission v Poland*, Joined Cases C–715/17, C–718/17 and C–719/17.

<sup>53</sup> Judgement of 5 March 1996, *Brasserie du Pêcheur*, Joined Cases C–46/93 and C–48/93.

<sup>54</sup> Which could be witnessed in its handling of the adoption of the Hungarian emergency law during the corona crisis for example.



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